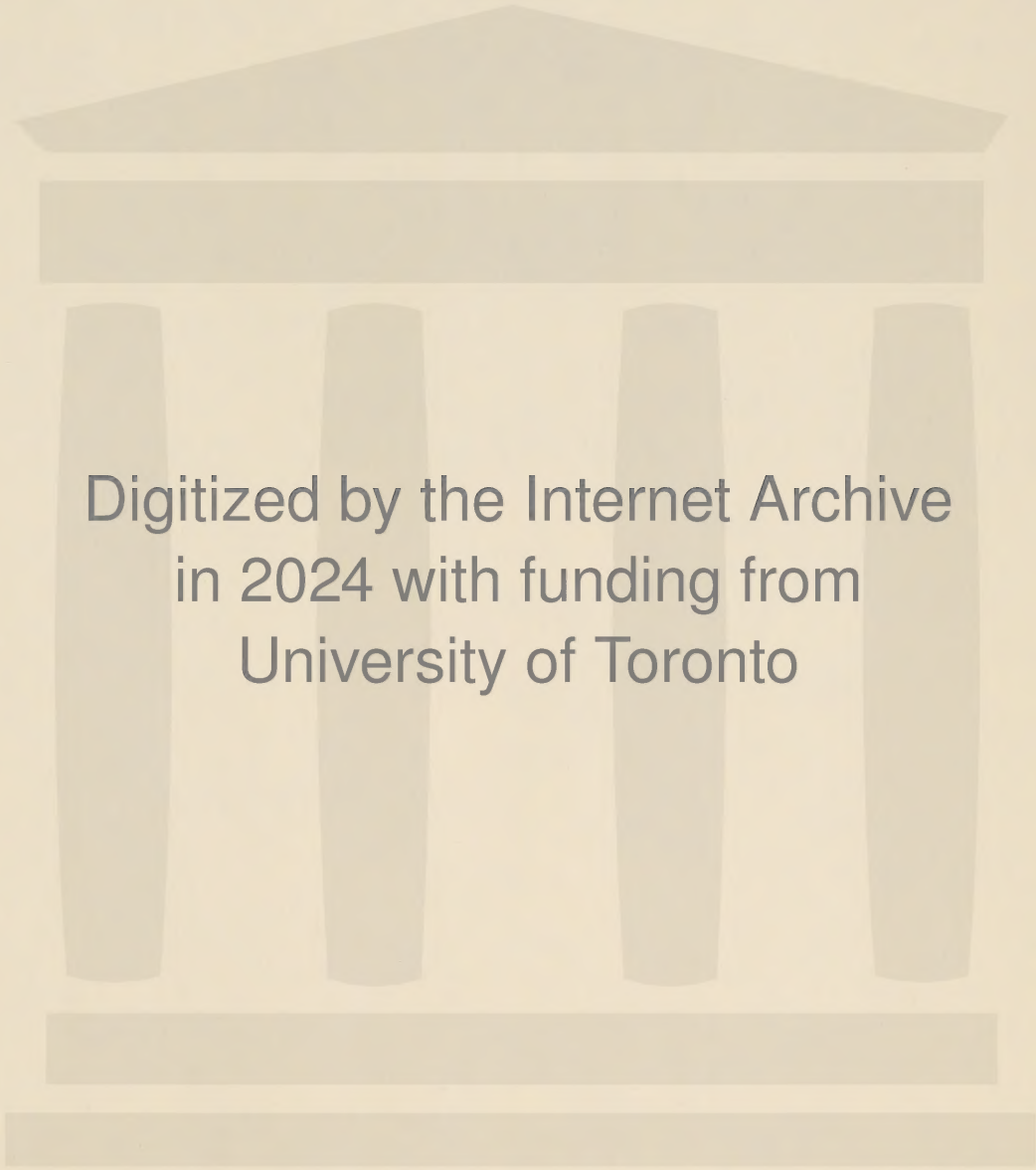
Ontario

Workers' Compensation Appeals Tribunal
Tribunal d'appel des accidents du travail

MEMBERS' CODE OF PROFESSIONAL RESPONSIBILITY

APRIL 1993



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INTRODUCTION

This Code of Professional Responsibility applies to all Tribunal members: the Chair, the vice-chairs and the representative members, both full-time and part-time. It defines the professional obligations and restrictions which arise implicitly from a member's role at the Tribunal.

The Code reflects the unique features of the Appeals Tribunal and of the members' particular roles in the Tribunal's adjudication activities, and is responsive to the Chair's and members' experience with issues of professional responsibility since the Tribunal's inception. A detailed description of the Code's tribunal context has been incorporated by way of an extensive preamble.

PREAMBLE

The Workers' Compensation Appeals Tribunal is an independent, tripartite adjudicative tribunal created by provisions in the *Workers' Compensation Act*.[1] The Tribunal is charged by that Act with the responsibility for hearing and determining "on their real merits and justice" appeals from final decisions of the Workers' Compensation Board. It also has the responsibility for the original adjudication of a number of related issues.

From an adjudication perspective, the Tribunal is comprised of the "Chair", a number of "vice-chairs", and equal numbers of "members representative of employers" and "members representative of workers", all of whom are appointed by order of the Lieutenant-Governor-in-Council.

The Tribunal's adjudication decisions are made by a "panel".[2] A panel is defined by section 84(2) as composed of:

1. The chair or a vice-chair of the Appeals Tribunal.
2. One member of the Appeals Tribunal representative of employers.
3. One member of the Appeals Tribunal representative of workers.

The statute gives panels all the jurisdiction and powers of the Tribunal, and provides that their decisions are "decisions of the Appeals Tribunal". Panels are chaired by the Tribunal Chair or a vice-chair.

Individual panels are "established" by order of the Tribunal Chair.

In this Code, the words "member" or "members" refer to anyone holding an active Order-in-Council appointment to the Appeals Tribunal. Thus the reference includes the Tribunal Chair, the vice-chairs, the members representative of employers and the members representative of workers. The latter two categories of members are referred to collectively as "representative members".

The members' adjudication roles are the major influence in the determination of their professional responsibilities. It is, therefore, important to be clear as to the nature of those roles. And, with respect to the representative members, it is especially important to note that the comparability of their role to the traditional idea of an adjudicator's role — the idea exemplified by the role of a judge, for instance — is rendered somewhat uncertain by the fact that their roles are characterized by the statute as that of a "member representative of" employers or workers.

At least to the lay eye, the fact that the statute defines a "panel" as comprising the Tribunal Chair or a vice-chair and one "member representative of employers" and one "member representative of workers" seems rather to suggest some partisan role for the representative members.

There is, however, a substantial body of common law relating to the requirements of impartiality and independence for adjudicators which must be

1 R.S.O. 1980, c. 539, s. 86a, as enacted S.O. 1984, c. 58, s.32. All further references are to the *Workers' Compensation Act*, R.S.O. 1990, c. W.11.

2 Tribunal decisions may also be made by a Tribunal "quorum" as defined in section 83(1) of the Act. However, in practice, the quorum is rarely used.

considered in assessing the representative members' professional responsibilities. This law is described in the Trethewey memorandum (The Requirements of Impartiality and Judicial Independence) which is attached as *Appendix A*.

And it appears that the courts have been clear that "worker" or "employer" members of a tripartite panel of a quasi-judicial tribunal have the same obligation to act impartially and to be seen to act impartially as have the so-called "neutral" panel chairs. This may be seen in decisions of the Ontario Court of Appeal in *Re Ontario Labour Relations Board, Bradley and Canadian General Electric Co.* (1957) and in *R. v. Ontario Labour Relations Board; ex parte Hall* (1963).

Nevertheless, there has been some support amongst legal commentators for the view that the tests of impartiality ought to be less strict with respect to representative members of a tripartite adjudicative panel. And some judicial support for a more relaxed view of the obligations of "representative" adjudicators is suggested in the 1974 Nova Scotia Court of Appeal decision in *Tomko v. Labour Relations Board (Nova Scotia)*. The decision of the Supreme Court of Canada on the appeal in *Tomko* lends additional weight to that suggestion, even though the appeal was dismissed on this issue without comment.

Also running counter to the courts' traditional views on this point is the popular perception of the role of representative members to be found in Ontario's worker and employer communities. This is a perception which has been especially fostered by the traditional role of representative members in labour relations adjudication — particularly that of grievance arbitration board members nominated by unions and employers.

In the latter tradition, it is frequently the case that, notwithstanding the courts' expectation of impartiality, employers and unions see the role of their "representative members" (and of the other side's representative members, as well) to be entirely partisan. Their perception is that such members are appointed to an arbitration board only for the purpose of persuading the neutral board chair to make a decision that is as much in the interests of the member's "client" as possible.

It is against that background of explicit statutory provisions, the common law, and Ontario practice, that the Tribunal has developed its own view as to the nature of the adjudicative role of its representative members.

A description of that role was set out in the First Report — the Tribunal's first annual report published in 1986 — and that description remains valid today.

The First Report described a recognized role for representative members at hearings and panel caucuses "of keeping one eye on making sure the process is understanding and taking due account of the general issues of special interest to their respective constituencies". (Thus was the representative nature of the role acknowledged.) But "at the point of decision", the Report records, the Tribunal expects that the representative members will "each remove his or her partisan hat and apply in good faith his [or her] own best judgement as to what is right in the circumstances of each particular case".

The willingness of the Tribunal's representative members to commit themselves to an impartial role in the decision-making process (taken together with the confidence of their colleagues in the genuineness of that commitment) has produced an institutional environment at the Tribunal where adjudicative decisions are truly tripartite decisions — decisions to which all three panel members have contributed, not as advocates, but as *adjudicators*. To distinguish this type of tripartitism from the "advocacy" concept traditionally embraced by Ontario's worker and employer communities, the Tribunal has come to refer to it as "collegial tripartitism".

It is interesting to note that this concept of collegial tripartitism parallels exactly Professor Weiler's own expectations for this Tribunal. In his 1980 report, *Reshaping Workers' Compensation for Ontario*, which is widely understood to be the origin of the external appeals tribunal concept in Ontario, Professor Weiler described his views on the role of representative members at the Tribunal in the following terms (at page 114):

> It is important to emphasize that these Board Members [the representative members] would not function as pure delegates of their outside organizations, acting as no more than advocates of their particular interest groups, right or wrong. While they can and should make certain that all the concerns of the workers and employers in [their] region or

industry are brought forth and taken into account, ultimately they must be prepared to make a balanced judgment about the merits under the statue of the case before them. Development of that kind of ethos on the tribunal is not merely a fond hope. During my stint as Chairman of the B.C. Labour Board, we never had more than a dozen dissenting votes in a year out of more than four thousand cases, some of which were of extreme significance to labour and business. (Occasionally this dissent was delivered by a neutral vice-chairman against the combined verdict of the union and employer members.) I anticipate that a Workers' Compensation Appeal Tribunal would function in the same judicious fashion.

In 1989, the Tribunal Chair had occasion to defend the Tribunal's collegial tripartitism. Since this concept is a critical feature of the context in which this Code of Professional Responsibility has evolved — particularly the Code as it relates to representative members — that defence is repeated here:

> The problem with the traditional advocacy model of tripartite adjudication is that it deprives worker and employer tribunal members of any actual adjudicative role. It casts them instead in the role merely of advocates of partisan positions and interests — a role that is effectively indistinguishable from that of the worker or employer representatives who formally advocate the worker's or employer's interests during the course of the hearing. The only difference is that the advocacy by tribunal members is expected to occur in the privacy of panel caucuses, with an unsuccessful member's loyalty to the acceptable partisan position being signaled to their community by a ritual dissent.
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> In that model, the actual adjudication is performed solely by the panel chairs who alone are committed to developing and expressing their own genuine opinion. Panel chairs in that model owe no obligation to their panel "colleagues" beyond the courtesy of attention extended to any partisan advocate — a courtesy attenuated, however, by the fact that the advocacy is imposed at a point when the chair is likely to feel that the time for advocacy is over and the time for decision has arrived.
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> In the advocacy model, the reality is that there is no worker or employer perspective present in the actual decision-making process. The panel chair who alone directs his or her mind to what the decision *should* be is rarely a person with any substantial experience of the workplace.
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> I, and those of my original Tribunal colleagues who also had prior personal experience of the traditional advocacy model of tripartite adjudication, had not been impressed with the utility of that model. From the outset, therefore, we were determined to try and create a tribunal in which experienced worker and employer perspectives were actually engaged in the decision-making process itself.
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> The outcome of that experiment may be seen in the emergence of a Tribunal in which the adjudication decision is not the exclusive business of the panel chair but is actually the product of the give and take of caucus debate amongst colleagues who see themselves and their two other panel members as equal decision makers. The worker and employer members bring to the process varied perspectives borne of their experience of the workplace as either employer or worker (and are representative in that important sense), and they accept a responsibility for making sure that their communities' interest in a particular case is understood and fairly considered. But at the point of decision they share with each other and with the panel chair a common commitment to pursuing the truth as it is genuinely given to each of them to see it.
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> The agreement of worker and employer members to abandon, in the decision-making process, the role of partisan advocate is precisely what allows that process to occur. ...
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> It is my conviction — a conviction which is shared by virtually all of the Tribunal's worker and employer members, and certainly by all full-time worker and employer members — that the Tribunal's collegial decision-making process has been a dramatic success. For the first time in our respective varied experience of tripartite adjudicative institutions, we can see the special worker and employer perspectives being, in fact, strongly influential in the decision-making process. The general quality and appropriateness of the Tribunal's decisions are largely attributable, in our view, to the effectiveness of those influences. ...
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> ...Worker and employer members of this Tribunal are routinely joining in significant decisions which are ostensibly against their respective communities' interests, as that interest is popularly understood. They do this because they have in fact been persuaded by the evidence and submissions as to the better merits of the other side's case and because, as previously noted, they realize that they can only have a role as an actual adjudicator if they are prepared to be honest about their conclusions.

It is, of course, acknowledged, as indicated by the Nova Scotia Court of Appeal in *Tomko*, that representative members bring to the solution of the Tribunal's adjudicative problems an experience and knowledge acquired "extrajudicially" . And it is obvious that individuals appointed to representative member positions at the Tribunal may well have pre-existing, personal convictions as to what the right answer is on many of the contentious issues in the workers' compensation area. This will be particularly true of those appointed from a background in workers' compensation advocacy.

This is not, however, a circumstance unique to representative members. The Tribunal Chair and vice-chairs may also bring to their work at the Tribunal pre-existing points of view on contentious issues. Furthermore, for all Tribunal members, the

very process of participating in decision-making in a large number of cases will routinely produce personal points of view on contentious issues which, relative to new appeals, may be said to be pre-existing.

The presence of pre-existing opinions is not intrinsically a problem. It becomes a problem, however — both practically and in law — when members are seen by their colleagues or by the parties to be irrevocably committed to those opinions. Accordingly, all members, including representative members, must be, and must be seen to be, genuinely willing to review their pre-existing views in the light of new evidence and submissions. Everyone, and perhaps especially colleagues, must be confident that a member is truly open to persuasion to a different view by the merits of a stronger case.

Adjudication is not, however, the only responsibility for members of the Tribunal. For representative members in particular, there are non-adjudicative roles which are especially significant from an institutional and systemic point of view. These roles too have an important bearing on the nature of the representative members' professional responsibilities.

The most important of these is the special role representative members have as communication links between the Tribunal and their respective communities.

The Tribunal is, effectively, the court of final appeal in all workers' compensation matters. It issues approximately 1,000 workers' compensation decisions each year, most of which are controversial from the perspective of one party or the other and many of which are controversial from a systemic perspective. Over time, these decisions taken together also have significant impact on the overall cost of the system for employers and on the nature of the benefits available to workers. The Tribunal's continued acceptability in both the employer and worker communities may be seen, therefore, to be essential to a healthy system.

The workers' compensation system is also a system, however, that is particularly prone to having its adjudicators misunderstood. System adjudicators decide many emotion laden issues involving very serious consequences. Frequently, the people affected are technically unsophisticated while the reasons for the decisions are — inescapably — technically arcane.

This combination of a large volume of high-profile, frequently controversial decisions and an inherent propensity for misunderstandings, taken together with a system in which clients usually have no effective recourse against unfavourable Tribunal decisions, makes the Tribunal's credibility inherently fragile.

In these circumstances, it seems right to recognize that one of the major benefits of having employer and worker members "inside" the Tribunal is the informal contribution that such inside placements are capable of making to the elimination or amelioration of misunderstandings between their respective communities and the Tribunal.

In their role as informal consultants to the Tribunal on their community's views and concerns, and in their role as their community's inside witnesses to the Tribunal's activities, the representative members are communication links on which the stability of the Tribunal's relationship with their respective communities may often well depend.

Representative members also have an informal role to play in the educational and law-reform activities of their respective communities.

In their adjudication work, representative members have, of course, a natural, *formal* role in the law development process. Their participation in the Tribunal's decision-making process influences the interpretation of statute language, and Tribunal decisions in which they participate or dissents which they write are important vehicles of law development in their own right. But, as has been recognized in this Tribunal from the start, the latter role cannot be a partisan role.

However, experience as an adjudicator in attempting to apply the law in an impartial way to large numbers of concrete instances gives representative members a perspective on law-reform and educational needs in the workers' compensation field — and information about such needs — which no one else in their communities can have. And the passing on of that perspective and information for partisan purposes by representative members through informal contacts with colleagues in their respective communities ought to be regarded as a natural and important part of the system's

law-development process. It is, in point of fact, no more than another expected outcome — and advantage — of the concept of representative member positions within the Tribunal.

The risk of conflict with a member's responsibilities as an adjudicator is obvious in activities of that nature. However, that risk would seem to be manageable. And the acceptance of some risk is justified by the unique contribution which such activity is capable of making to the development of law-reform initiatives that are well-informed and practical.

Similar activity by the Tribunal Chair or by vice-chairs, however, would be incompatible with their non-representative or "neutral" role and thus not acceptable.

It is also important to consider the members' institutional role in the Tribunal. Members, it is essential to remember, are senior officers of the Tribunal's corporate structure, and there are certain professional obligations and restrictions that arise by reason of that fact.

The nature of these institutional, professional obligations is significantly affected by the fact that the Tribunal has a corporate responsibility in the adjudication of particular Tribunal cases which goes beyond the mere timely establishment of a panel to hear and decide a case.

This understanding that the Tribunal has a corporate responsibility for the adjudicative work of its individual panels is admittedly a concept of some novelty relative to traditional administrative law precepts. There can, however, be no mistaking the existence of that responsibility, at least in the case of this Tribunal.

It is, for instance, the "Tribunal" which the statute charges with the responsibility for hearing and deciding appeals — not panels or individual members. Panels comprised of members are the means by which the Tribunal typically performs its institutional adjudicative responsibilities. Panels make *Tribunal* decisions not *panel* decisions.

A particularly revealing light is thrown on the "corporate" aspects of the Tribunal's adjudication activities by the statutory provision concerning the reconsideration of Tribunal decisions. The reconsideration provision specifies that the "Tribunal" may reconsider a decision if it — the Tribunal — finds it advisable to do so. The power is the Tribunal's and not that of the panel which made the decision in the first instance. Thus it is open to the Tribunal Chair to establish a new panel to reconsider a decision made by a previous panel and, in appropriate circumstances, the reconsideration panel may make a new Tribunal decision.

To perceive at an intuitive level this concept of Tribunal corporate responsibility for Tribunal adjudicative decisions, one need only contemplate the contrast between what the public's perception would be if Tribunal panels were to be seen as generally delivering decisions that were unfair, untimely, poorly reasoned, and inconsistent, and what that perception would be if the judges of the Ontario Court were delivering similar decisions. In the latter instance, the popular perception would be that the government had appointed some bad judges. In the former case, everyone would be sure that we had an incompetent Tribunal.

Explicit judicial approval of an institutional or corporate role for specialized quasi-adjudicative tribunals in the adjudicative activities of their members has recently emerged in the *Consolidated-Bathurst* and *Tremblay* decisions of the Supreme Court of Canada.

The members' personal professional obligations are shaped in important measure by the Tribunal's corporate, adjudication obligations. And in considering these, it is very important to appreciate that as the final level of appeal in a system where there is no right of appeal to the Courts, the Tribunal is responsible for functions that go well beyond making fair decisions in individual cases. They include the supervision of the system's commitment to treating like cases in a reasonably like manner, and the resolution, on a consistent and system-wide basis, of problems such as: ambiguous statute language; the definition of the limits of entitlement in cases at the margins of the system's coverage; and controversial medical or scientific issues. To properly fulfill these functions the Tribunal's decisions must be concerned with underlying principles and reconciling themes.

Consideration of these systemic functions will illuminate a number of things for which the Tribunal has corporate responsibility, of which, arguably, the most important are as follows:

1. Establishing Tribunal-wide standards regarding the quality (including the consistency and coherency) of Tribunal decisions.
2. Establishing Tribunal-wide standards regarding the timeliness, fairness, effectiveness and efficiency of the process and procedures used in hearing and determining

appeals or applications and in the use of the Tribunal's investigative powers.

3. Ensuring that the adjudicative activities and decisions of its large numbers of members comport reasonably with such standards. This entails resort to corporate strategies and procedures which, consistent with general effectiveness, interfere as little as possible with the adjudicative autonomy of members and which conform with the law in that respect — particularly the law as elucidated in *Consolidated-Bathurst* and in *Tremblay*.

It is in light of the foregoing context as well as the applicable law as set out in the Trethewey memorandum (*Appendix A*) that this Code of Professional Responsibility for Tribunal members has been developed.

The Code encompasses much of the Tribunal's previous Conflicts of Interest Policy which was first adopted in 1986. It has been expanded, however, to address specific questions — particularly questions concerning the outside activities of members — that have been the subject of more recent discussion both within the Tribunal and amongst the employer and worker communities.

THE CODE

The professional obligations and restrictions pertaining to membership in the Tribunal — whether part-time or full-time — include the following:

Conflicts of Interest

1. Members must abide by the pecuniary conflict of interest guidelines for agency appointees set out in the Ontario Manual of Administration. A copy of those guidelines is attached as *Appendix B* to this Code.

2. Any money or significant gifts received by a member which are, or which might be perceived to be, associated with the member's role at the Tribunal should be returned to the sender. If the item cannot be returned, the item should be delivered to the Chair for appropriate action.

3. Subject to the explicit, permissive provisions in this Code, members must avoid non-pecuniary conflicts of interest.

4. For purposes of this Code, a non-pecuniary conflict arises when a member's relationships or activities inhibit or may reasonably be thought to inhibit the impartial discharge of his or her obligations as a member of the Tribunal. A conflict with the member's role at the Tribunal will also be deemed to exist if his or her relationships or activities are in any other respects incompatible with the Tribunal's commitment to independent, impartial and competent adjudication.

5. It is in the nature of conflicts of interest that except in situations where public facts speak clearly for themselves, the Tribunal must rely on the individual member's own good sense of propriety in the identification of potential conflict-of-interest problems. It will often be the case that only the member will have the necessary information.

6. In assessing the potential in any set of circumstances for a conflict-of-interest issue to be important, members must be focused on two questions:

   First, given the relationship or activities which have brought the question to mind in the first place, do they feel personally comfortable about their ability to act impartially?

   Secondly, if they are personally confident that the circumstances in question do not affect their ability to act impartially, are they also convinced that a reasonably informed stranger with access to all the objective, particular facts would also be confident that the relationship or activity would not impact negatively on either the member's or the Tribunal's ability to act impartially? (Members should have in mind a stranger who has not been asked for his or her opinion until following receipt of an unsatisfactory decision a party has complained that the decision was improperly influenced by the relationship or activity in question.)

7. The following examples are intended to assist members in identifying the types of relationships or activities from which conflict-of-interest questions may be expected to arise, subject, as mentioned, to this Code's explicit, permissive provisions.

   (a) A Tribunal member appearing as a representative before the WCB or the Tribunal on behalf of any party, or consulting with

any party or any party's representative in connection with the preparation of a specific case before the WCB or the Tribunal.

(b) A Tribunal member participating as a panel member in the adjudication of an appeal or application in a case in which the member or a relative or close personal friend of the member has an interest in the outcome.

(c) A Tribunal member participating as a panel member in the adjudication of an appeal or application in a case in which the member or a relative or close personal friend of the member has had prior involvement.

(d) A Tribunal member participating as a panel member in the adjudication of an appeal or application in a case in which the member has or may reasonably appear to have an ongoing business or personal relationship with a party.

For instance: sitting on a next-door neighbour's appeal would be one possible example of participating in a case where there might at least be the appearance of a personal ongoing relationship.

(e) A Tribunal member participating as a panel member in the adjudication of an appeal or application in a case in which the member's relationship with a party's representative is especially close. An obvious example would be where the representative was the member's sister.

Conduct of Members

8. Members shall be conscientious in the performance of their adjudication functions, and shall not allow outside activities to interfere with the effective and timely performance of their adjudicative responsibilities.

9. Notwithstanding pre-existing personal views, all members shall approach the hearing and determination of every appeal or application with a mind that is, with respect to every issue, genuinely open to persuasion by convincing evidence and argument, and shall try to avoid doing or saying anything that would cause a well-informed, reasonable person to think otherwise.

10. All members shall base their adjudication decisions on the real merits and justice of each case as genuinely judged by them on the law and on the material received in evidence in that case.

11. Members must be prepared to listen with empathy and respect to the concerns and views both of the parties and their representatives and of their panel colleagues and to fairly consider those views and concerns on their merits. They must also be prepared to share fully with their panel colleagues their own concerns and views about the case and the reasons for them.

12. In hearings or in caucuses, representative members may take reasonable steps to ensure that issues and concerns of particular interest to their community are understood and are being fairly considered.

13. Members shall make themselves available on a timely basis for such caucus discussions as their panel colleagues consider desirable, and in the course of a hearing will respond at any time to a call by a member of the panel for consideration in caucus of any question or matter arising in the hearing.

14. The Tribunal does not view unanimity in a panel decision as a value in itself. Members shall not abandon views they hold with conviction on points of substance in exchange for panel agreement on other points. Panel caucus discussions are for the purpose only of assisting each panel member's understanding and to help the panel come to the right decision on each issue.

15. When, after full caucus discussion and personal consideration, members ultimately find themselves unable to agree with a majority of their panel colleagues, a reasoned dissent should be written.

16. Members who are aware of private information they have that is arguably relevant to any issue in a case must share that information with their panel colleagues so that a panel decision may be made as to the relevancy of the information and, thus, as to the need to share the information with the parties.

17. Pre- or post-hearing searches for expert evidence or other evidence to be used in a case shall not be conducted or requested by a panel member without the prior approval of the panel. This rule does not apply to panel members' initiatives taken for the purpose of educating themselves generally in respect of the technical background necessary to a reasonable

understanding of technical reports found in a Case Description.

18. In their role as adjudicators, members shall not allow any prospect of government, WCB, community, colleague, or any other persons' disapproval to deter them from making or joining in decisions which after full and careful consideration they themselves believe to be correct.

19. All members must respect and apply the rule of law in good faith and to the best of their ability and understanding notwithstanding any awkwardness, unpopularity or cost of the ensuing result. In short, they must be prepared to go where the law and the evidence fairly takes them.

20. Members shall conform in good faith with current Tribunal procedures and practice unless, in the opinion of a panel, anomalous circumstances in a particular case justify some departure.

21. Members shall accept responsibility for seeing that decisions of panels of which they are a member comply with the Tribunal's Hallmarks of Decision Quality. A copy of the Hallmarks is attached as *Appendix C*.

22. Members shall respect the role of the Tribunal's procedures for ensuring so far as it is reasonable and appropriate to do so that Tribunal decisions are complying generally with the Tribunal's Hallmarks of Decision Quality, and shall participate in good faith in those procedures. A copy of the Guidelines for the Review of Draft Decisions is attached as *Appendix D*.

23. On contentious generic issues, members must not ignore relevant Tribunal decisions.

24. Members must ensure that when previous, applicable Tribunal decisions are not followed, full reasons justifying that departure are written.

25. When, in a mature body of Tribunal decisions, a preponderance of support for a particular view on a generic issue has become clear, in deciding whether or not to follow that view in subsequent decision-making, members must give due weight to the system's legitimate and important need for reasonably uniform treatment of cases and predictability of outcomes.

26. Members should maintain a reasonably non-partisan and respectful style and posture in all their professional dealings with colleagues, parties, representatives and witnesses. This applies particularly to the questioning of witnesses and to the interchanges with parties or their representatives during hearings.

27. Members must keep themselves up-to-date on the Tribunal's developing body of decisions (through, for instance, the routine reading of the weekly summaries of decisions), and must remain apprised of internal, Tribunal-wide discussions on substantive medical, legal or procedural issues.

28. Representative members are encouraged to avail themselves of such opportunities as are reasonably available for keeping themselves aware of the developing views or concerns of their respective communities, and for communicating relevant views or concerns to the Tribunal.

29. Once appointed, members must thereafter not knowingly permit their names to be publicly associated with any point of view on any appealable workers' compensation issue, beyond the association which occurs in the ordinary course due to the publication of Tribunal decisions in which they have participated.

30. Members may communicate outside the Tribunal information about the Tribunal's practice and procedures and about the Tribunal's released decisions and about the reasons that the Tribunal has given in support of such decisions.

31. Representative members may acquire or retain membership in any organization devoted to the interests of workers or employers generally (including workers' compensation interests) and may attend the public functions of such organizations from time to time. However, high-profile roles such as those involving executive responsibility shall be declined.

32. Membership in political parties and participation in their activities shall be governed by the applicable government rules.

33. Members shall not belong to partisan organizations, or other structures, which specialize in workers' compensation issues.

34. Representative members shall refrain from any activity devoted to the development of a worker-members' or employer-members' group "position" on any substantive or process issue, and the Tribunal Chair and the vice-chair members shall refrain from any activity devoted to the development of a panel-chairs' "position" on any substantive or process issue.

35. In any activity outside the Tribunal, no member may have or accept any responsibility or role in the management, preparation or advocacy of any worker's or employer's workers' compensation file.

36. Subject to point 29 and points 38 and 39 below, representative members may participate in the informal sharing with their community colleagues of generic information or perspectives that the members have acquired in the course of their Tribunal adjudication experience and which may be helpful in their community's partisan, educational or law-development work.

37. While remaining a member of the Tribunal or continuing to participate in the Tribunal's adjudication processes, members must respect the confidentiality of the Tribunal's decision-making processes and, as well, accept the restraints on public criticism of the organization — or of colleagues — which are traditionally associated with the obligations of loyalty owed to any organization by its senior officials.

38. The Tribunal adjudicates issues which require members to have access to personal and other confidential information the publication of which might be embarrassing or otherwise prejudicial to parties or their families or associates. Therefore, except as legally required (and in that case only after reasonable advance notice to the Tribunal Chair), members shall not disclose or give to any persons any information or document that comes to their knowledge or into their possession by reason of their position as Tribunal adjudicators, other than information or documents which are otherwise available to the public. Members must also take effective steps to protect the confidentiality of information or documents obtained for purposes of any case and in their possession.

39. Members must refrain from disclosing confidential Tribunal information.

Obligations After Ceasing to be a Member

40. Members who cease to be members continue to be bound by the obligations of confidentiality in respect of any matter arising while they were a member. They are also prohibited from appearing before the Tribunal as representative or adviser to a party until any outstanding decisions have been released or six months have elapsed since the membership terminated, whichever is sooner. If the retired or resigned member was a Vice-chair, the restriction shall apply for six months after the release of the last decision for which they were responsible. The Tribunal Chair may vary these restrictions in appropriate circumstances.

41. Any person who ceases to be a member, but continues to discharge his or her adjudicative duties as authorized by section 85 of the Act, shall continue to be bound by the obligations and restrictions of this Code as they pertain to those duties.

COMPLIANCE PROCEDURES

1. The Tribunal has an institutional interest in its members' compliance with this Code, and the Tribunal Chair may initiate consideration of any question of compliance. Members may also bring any matter concerning the Code to the attention of the Chair, whether it is personal to them or to other members. In either case, the Chair is free to consult the Executive Committee or any of its members, or any other person.

2. Except for case-specific conflict issues arising during the course of a hearing, which must be decided by the hearing panel, the ultimate resolution of any issue under this Code is recognized to be within the jurisdiction of the Chair. The Chair shall adopt such reasonable process as may be appropriate in respect of any measures that he or she may have in view in any particular circumstance.

3. Members' conflicts of interest are not only a potential problem for the member affected, they are also a potential problem for the Tribunal and for any panel on which a conflicted member may sit. But the Tribunal and panels rely on individual members for identifying in any case to which they have been assigned the existence of circumstances which may possibly present a conflict of interest.

4. If the possibility of a conflict first comes to light at a time when it is still possible to appoint another member to the affected panel, the member identifying the potential problem shall bring it to the attention of the Tribunal Chair. The Chair, in consultation with the potentially conflicted member, shall decide whether it is necessary to appoint a replacement member. In the event that the Chair elects to leave the member on the panel, the Chair, if he or she thinks it advisable, may inform the other panel members of the decision. If the panel is not satisfied with the Chair's decision, it may subsequently elect to adjudicate the conflict issue.

5. When the circumstances suggesting a possible conflict of interest problem come to a member's attention on the eve of a hearing where it is not convenient to find a replacement member, or in the midst of a hearing, the member concerned will raise the matter first in the privacy of a caucus of the hearing panel. If, after consultation, the member and the panel conclude that the possibility of conflict is sufficiently remote that the matter need not be raised, the member may continue to sit on the panel and the hearing may proceed in the ordinary course.

6. If either the member or the panel is not satisfied that the potential conflict can be appropriately ignored, the matter shall be presented to the parties, and their views on the significance of the potential conflict solicited. The panel shall then adjudicate the question of possible conflict in the light of those submissions. If it finds there is a conflict, the hearing will be terminated and the hearing of the appeal or application will be begun again before a new panel established by the Tribunal Chair, and the case will be rescheduled.

7. If the panel decides that a conflict does not exist, the hearing will then continue in the ordinary course. The member affected shall accept the panel's decision on the issue and continue to serve on the panel unless, notwithstanding the panel's decision, he or she remains personally satisfied that there is in fact a significant doubt as to his or her actual ability to be impartial in the case.

8. In the course of their consideration of any conflict problem, the potentially conflicted member or the panel may appropriately consult with the Counsel to the Chair, the Alternate Chair, or the Tribunal Chair. And, because of the Tribunal's special institutional interest in matters of this nature, on any question of difficulty they are encouraged to do so.

APPENDIX A

THE REQUIREMENTS OF IMPARTIALITY AND JUDICIAL INDEPENDENCE [1]

I Issue

You asked me to review the possible sources of a court challenge for bias arising from panel members' activities, especially in the context of tripartite tribunals. In particular, you wanted to know if there were any cases dealing with part-time side members who also appear as representatives before the same tribunal.

II Overview

There are numerous cases dealing with bias. There is also the developing area of judicial independence. The cases generally agree on the test to be applied in determining whether there is bias or a lack of judicial independence; what would an informed person viewing the matter realistically and practically and having thought the matter through, conclude? However, the courts do not always appear to apply this test consistently to the facts before them. The following discussion reviews some of the leading examples of bias and lack of judicial independence.

With respect to part-time members appearing as representatives, there do not appear to be any Ontario cases on this. The weight of authority from other provinces, combined with the recent Supreme Court of Canada cases on bias and judicial independence, indicate that it is probable that this would create a reasonable apprehension of bias.

While the OLRB has allowed part-time side members to act as representatives, I am advised that this has never been subject to a court challenge. The Ontario Pay Equity Hearings Tribunal and the B.C. Workers' Compensation Review Board, in addition to the Appeals Tribunal, do not allow part-time side members to appear as representatives.

III Discussion of the Law

General Principles Governing Bias and Lack of Judicial Independence

1. The general requirement that justice must not only be done, but should manifestly and undoubtedly be seen to be done, applies to quasi-judicial proceedings before a tripartite body. This legal maxim applies whenever circumstances exist which create a danger of injustice (for example, a reasonable apprehension of bias, or a lack of independence).

1 Memorandum to S.R. Ellis, from Carole Trethewey, April 13, 1993.

The test to be applied in determining judicial independence and bias is similar: What would an informed person, viewing the matter realistically and practically and having thought the matter through, conclude?

Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69 (1990), 68 D.L.R. (4th) 524 (S.C.C.) per Gonthier, J., on behalf of the majority at p. 562, adopting the test from *Committee for Justice & Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394, 68 D.L.R. (3d) 716 at p. 735.

R. v. Ontario Labour Relations Board; ex parte Hall, [1963] 2 O.R. 239, 39 D.L.R. (2d) 113 (Ont. H.C.J.)

2. While the Supreme Court of Canada has recognized that the duty of fairness may vary depending on the nature and function of the administrative body, primarily adjudicative tribunals (such as the Appeals Tribunal) must comply with the standard applicable to courts.

   Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities) (1992), 89 D.L.R. (4th) 289 (S.C.C.) per Cory, J., on behalf of the Court at p. 299

3. The requirements of impartiality and judicial independence are closely related. The rule against bias is directed to the state of mind of the decision-maker. An adjudicator must act with a free, independent and impartial mind.

   Re Ontario Labour Relations Board, Bradley and Canadian General Electric Co., [1957] O.R. 316 (Ont. C.A.)

   R. v. Ontario Labour Relations Board; ex parte Hall, Supra.

4. Judicial independence is a safeguard for judicial impartiality. Judicial independence connotes not merely a state of mind or attitude in the exercise of judicial functions, but a status or relation to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

   R. v. Lippe (1990), 61 C.C.C. (3d) 127 (S.C.C.)

5. In addition to acting impartially, a quasi-judicial tribunal must have judicial independence. It is an accepted principle of judicial independence that individual judges must have complete freedom to hear and decide the case before them. No outsider, be it government, pressure group, individual or even another judge, should interfere in fact or attempt to interfere with their decision.

   Consolidated-Bathurst v. International Wood Workers, per Gonthier, J. at p. 561

   R. v. Lippe, per Gonthier, J., for the majority
   (Note: The minority view in *Lippe*, as expressed by Lamer, J., is that judicial independence refers to independence from government. However, Lamer defines "government" broadly to include "any person or body which can exert pressure on the judiciary through authority under the state.")

Impartiality in a Tripartite Board

6. The question of how the principle of impartiality applies in a labour relations context, where side members are appointed as "representative" of employers or workers, has been discussed in a number of cases and legal articles.

7. Some commentators have expressed the view that the test for bias should not be applied as strictly to tripartite labour relations boards or boards of arbitration. The leading authority appears to be H. W. Arthurs, "The Three Faces of Justice — Bias in the Tripartite Tribunal", 28 Sask. Bar Rev. 146. Arthurs distinguishes between "direct" interest (active participation in the events giving rise to the proceeding) and "indirect interest" (general ideological and institutional commitments). He does not appear to feel either type of interest is necessarily disqualifying, but that the question of disqualification is one the individual member should decide as a matter of ethics. Arthurs argues that the "bias" of the worker member is offset by the "bias" of the employer member in most cases.

8. The Courts, however, have not accepted the idea that the bias of one side member of a labour relations board neutralizes the bias of the other. There have been some judicial acknowledgments that the members may have closer connections to the parties or issues than a judge would be expected to have, but the courts have approached the question of bias in a tripartite labour relations board in essentially the same way as bias in any other quasi-judicial tribunal.

9. It is generally accepted that members of a quasi-judicial tribunal must act impartially. Thus, side members appointed as "representative" of workers or employers to the Ontario Labour Relations Board do not "represent" their particular community in the sense of advocating their interests. Like a vice-chair, a side member must act with a free, independent and impartial mind and not as an advocate.

R. v. Ontario Labour Relations Board; ex parte Hall (1963) supra, at pp.116-117 D.L.R., 242-243 O.R.

And see, *Re Ontario Labour Relations Board, Bradley and Canadian General Electric Co.*, Supra

10. In *Re Marques v. Dylex Ltd.* (1977), 81 D.L.R. (3d) 554, the Ontario Divisional Court recognized that it was reasonable in the context of the Ontario Labour Relations Board, to expect that members of the OLRB, and in particular the panel chairs, would have experience and expertise in the law and labour relations. Most of these people would have "some prior association" with the parties coming before them. While this type of prior association might disqualify a judge, the Court found that there was no reasonable apprehension of bias where the vice-chair had not been associated with counsel for almost a year, had had nothing to do with the party for over a year and had never been involved in the particular matter. Nevertheless, the Court commented: "The matter of the prudence of the vice-chairman in sitting in the case is another issue which is not, of course, before us for decision."

11. The strongest statement that the standard for bias in a labour relations context is different from the standard applicable in the Courts was made by the Nova Scotia Court of Appeal in *Tomko v. N.S. Labour Relations Board et al.* (1974), 9 N.S.R. (2d) 277 at p. 298:

> One of the principles of "natural justice" that must be observed by the Panel and its members in exercising power under s. 49 is to act fairly, in good faith, and without bias. The rules which disqualify judges for personal interest in the result or likelihood of bias thus apply. See: de Smith on Judicial Review of Administrative Action, 3rd ed., c. 5, and Reid on Administrative Law and Practice, c. 7.
>
> This does not mean, however, that the standards of what constitutes disqualifying interest or bias are the same for a tribunal like the Panel as for the courts. The nature and purpose of the Trade Union Act dictate that members "bring an experience and knowledge acquired extra-judicially to the solution of their problems" (Lord Simonds in John East, supra, A.C. at p. 151, D.L.R. at p. 682).
>
> The many unions and many subcontractors and suppliers involved in any single construction project make it inevitable that union representatives on the Panel and most employer representatives would each have at least an indirect interest, much knowledge and many preconceptions and prejudgments respecting any matter coming before the Panel. Thus mere prior knowledge of the particular case or preconceptions or even prejudgments cannot be held per se to disqualify a Panel member.

12. The majority of the Supreme Court of Canada dismissed the appeal from *Tomko* on this point without reasons and without commenting on the Nova Scotia Court of Appeal's views. See *Tomko v. Labour Relations Board (Nova Scotia)* (1975), 69 D.L.R. (3d) 250 (S.C.C.). It is, thus, unclear how much the result was influenced by the fact that there were only two worker members on the Nova Scotia Board, both of whom had been at a meeting and discussed the case before the application was made. No worker members would have been available to sit on the panel, if the Court had found a reasonable apprehension of bias.

13. *Tomko* was decided by the Supreme Court of Canada in 1975. In 1976, the Supreme Court released *Committee for Justice and Liberty v. National Energy Board* (1976), 68 D.L.R. (3d) 716 (S.C.C.), which contains one of the leading statements on bias. While the dissent in *Committee for Justice and Liberty* relied on *Tomko* in concluding that no reasonable apprehension of bias existed, the majority did not refer to *Tomko* and found that there was a reasonable apprehension of bias. This, combined with the fact that the SCC did not give any reason for its holding on bias in *Tomko*, suggests that *Tomko* may be an anomalous decision.

14. The most recent SCC case to comment on the role of representative members is *Newfoundland Telephone Co. v. Newfoundland (Board of*

Commissioners of Public Utilities). The *Newfoundland Telephone* case deals with a public utilities commission, rather than a tripartite labour relations tribunal. However, it is useful because it indicates the constraints on representative members even when they are acting on a board which is not primarily adjudicating legal questions.

15. The Public Utilities Commission had investigative, prosecutorial and adjudicative functions. One member of the Commission was a well-known consumer advocate who had made strong public statements during the investigation and hearing stages of an inquiry regarding expenses. The Supreme Court held that once a matter proceeded to hearing, a higher standard of conduct applied. While members of an administrative board deciding a public policy matter were not held to as strict a standard as a board acting solely in an adjudicative capacity, procedural fairness required members of the Commission to conduct themselves so there could be no reasonable apprehension of bias.

Newfoundland Telephone Co., at p. 297

16. Representative members may be expected to put forth their community's point of view; however, they must strive for fairness and a just result. Even in deciding a policy matter "commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the board." The Supreme Court again indicated that a higher standard of conduct was required of adjudicative tribunals deciding legal issues.

Newfoundland Telephone Co., at pp. 297 and 300

Examples of Bias

17. Clearly, a panel member will be disqualified for bias if there has been any involvement with the actual case before the panel.

Committee for Justice and Liberty v. National Energy Board (1976), 68 D.L.R. (3d) 716 (S.C.C.)

Re Marques, Supra

18. A part-time adjudicator who is employed by one of the parties to an application or who is employed by a party who may indirectly benefit from the application is disqualified due to a reasonable apprehension of bias.

Re Canadian Shipbuilding and Engineering Ltd. and United Steel Workers of America, [1973] 3 O.R. 240 (Div. Ct.) leave to appeal to Ont. C.A. refused 40 D.L.R. (3d) 529n, 1 O.R. (2d) 441n.

(Note: This case involved an arbitration board, which may be held to a less stringent standard than a tripartite board composed of Order-in-Counsel appointments. Nonetheless, the Court held that a union nominee who was a paid employee of the union appointing him was not eligible to sit because he had important and dominant duties to his employer which might interfere with his duty to act as an impartial arbitrator.)

Re Simmons and Government of Manitoba (1981), 129 D.L.R. (3d) 694 (Man. C.A.) (another arbitration board case).

19. While union members may be able to sit on a case, an executive of a trade union appears to be under a special disability. The Courts have drawn a distinction between membership in a trade union and an executive responsibility to carry out declared policies of a trade union. "A man might well be a member of a trade union and be free to act with respect to matters before the Board affecting another trade union. It is, however, quite a different thing where a member of a Board has the dual responsibility, on the one hand to carry out the declared policies of the Ontario Federation of Labour and on the other hand to decide impartially any matters that may be in conflict with those policies. I do not think on any recognized principle of law applicable to judicial or quasi-judicial tribunals one who has clearly divided loyalties as in this case can be permitted to act."

R. v. Ontario Labour Relations Board; ex parte Hall (1963), supra at page 120

And see *Tomko*, N.S.R., p. 298:

"It would be a different situation of course, if the member were an officer of a union which was a party to the proceeding before the Panel or an officer of an employing company before the Panel: such a direct interest would clearly disqualify him."

20. It has also been held that a solicitor-client relationship between an arbitrator (and, by

analogy, an OIC appointment) and one of the parties is sufficient to give rise to a reasonable apprehension of bias.

Newfoundland Association of Public Employees . v. Newfoundland Treasury Board). (1991), 47 Admin. L.R. 149 (N.F.L.D. S.C.T.O.) applying *Szilard v. Szasz*, [1955] S.C.R. 3, [1955] 1 D.L.R. 370.

21. A tribunal member's activities away from the Tribunal may give rise to a reasonable apprehension of bias if they demonstrate a certain attitude. It has been held that a panel chair who was involved in his personal capacity with an organization providing major funding for a Charter challenge on the issue of mandatory retirement was disqualified from hearing a case involving mandatory retirement and the Charter. Interestingly, the party raising the objection was the one with whom the Chair might have been expected to sympathize. The Court concluded that that party could "realistically and practically conclude that Mr. Kerr, consciously or unconsciously was bending over backwards, to their detriment, so as to show his impartiality in the matter."

Canada (Human Rights Commission) v. Kerr (1990), 72 D.L.R. (4th) 574 (F.C.T.D.) at p. 578.

22. A panel member may also be disqualified for reasonable apprehension of bias where he or she makes strong, public comments on the merits of the subject matter of a hearing. This is so even where the board is held to a lower standard of conduct because it decides policy matters and performs investigative, prosecutorial and adjudicative functions. Strictly adjudicative tribunals will be held to the same standard of conduct as the courts.

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), at pp. 296 and 299.

Judicial Independence and Tripartism

23. While *Consolidated-Bathurst* established that the principle of judicial independence applies to a tripartite quasi-judicial body, there has been little consideration of how this would apply to the position of members who are "representative" of employers and workers.

24. In *Consolidated-Bathurst*, the majority of the Supreme Court of Canada recognized the need for a tripartite institution to take advantage of its collective expertise. Thus, the issue was not whether a particular practice (in that case, the OLRB's practice of reviewing draft decisions at full board meetings) could cause panel members to change their minds, but whether the practice impinged on the ability of panel members to decide according to their own opinions. The criteria for independence "is not the absence of influence but the freedom to decide according to one's own conscience and opinion."

Consolidated-Bathurst, per Gonthier, J.

25. The requirement of judicial independence was held to prevent a union from nominating an employee of its parent union as an arbitrator. While the Alberta Court of Appeal said that partiality was an accepted part of the arbitration process and would not, in itself, give rise to an apprehension of bias, there was an appearance of lack of independence or freedom of mind where an appointee to a board of arbitration was also an employee of a party, or an employee of a parent union of a party. The Court found it was reasonable to assume that an employee would favour its employer's interests and would not have the necessary freedom and independence mind. The result in this case, was thus, the same as the result in *Re Canadian Shipbuilding* and *Re Simmons*, but the Court found on the basis of judicial independence instead of bias.

Re Bethany Care Centre and United Nurses of Alberta, Local 91; Re Calgary General Hospital and Chartered Local No. 1, United Nurses of Alberta (1983) 5 D.L.R. (4th) 54 (Alta. C.A.)

Part-Time Adjudicators as Representatives

26. Finally, with respect to the particular question of whether a part-time adjudicator should also be able to appear as a representative, the practice of allowing a part-time side member to appear as counsel before the Manitoba Labour Board was

found to create a reasonable apprehension of bias. The Court rejected the argument that the practice was necessary to provide expert panel members. Denniset, J., commented:

> What confidence has the public in a board whose members switch positions from member (a judge) to counsel and back to member and back and forth? A judge must never approach a problem as a counsel must. The losing party who is not represented by a member might wonder if he should not have had a member to represent him.

Teullon Health Centre v. Canadian Union of Public Employees Local 3024, (1980), C.L.L.C. 257 (Man. Q.B.) at p. 258.

27. The approach in *Teullon Health Centre* was applied to the position of a union business agent who sat as a part-time member on the PEI Labour Relations Board at the same time as he was appearing as a witness on behalf of his union in a contentious application. The business agent continued to sit as a Board member, but did not participate in the Panel hearing the contentious application, nor did he sit on applications from his own union. He did sit on other applications with members who were sitting on the contentious application or who could have been assigned to it. The Prince Edward Island Supreme Court found that this created the same sort of reasonable apprehension of bias as in *Teullon*.

United Food and Commercial Workers' Union, Local 1252 et al. v. Labour Relations Board (Prince Edward Island) et al. (1988), 31 Admin. L.R. 200 (P.E.I.S.C.) affd. (1988), 31 Admin. L.R. 196 (P.E.I.C.A.).

28. The Prince Edward Island Court of Appeal stated:

> "The Labour Relations Board has an important judicial function in our society and therefore such a tribunal must inspire public confidence in its impartiality. When I consider in that light the nature of the dispute, the central role of the appellant's business agent, his special relationship with the board and the fact that a member of the panel assigned to these cases was at the same time his colleague on another board panel, I am unable to conclude that Chief Justice MacDonald did not have a reasonable basis for his finding that a reasonable apprehension of bias existed. Furthermore, I cannot find that the trial judge erred in law or did not have a reasonable basis for his ruling that the respondents had raised their objection to the panel in a timely fashion. Even if the respondents did know that the appellant's business agent was a member of the board, they did not know that he would continue to sit on board panels after the appellant filed his application. Once the respondents became aware that he had, they raised their objection. It may be understood that union employees will serve on labour relations boards from time to time but surely it cannot be taken as accepted that these employees will continue to sit and act as board members while their employer has a contentious application before the board."

U.C.F.W., Local 1252 at p. 198.

29. In order to prevent the possibility of bias, the PEICA. directed that a new panel should be struck to deal with the applications in question. The new panel could be composed of board members who had not sat on the matters to date and who had not served on any panels with the business agent since the matters in dispute first came before the board. The Court recognized that this might require the appointment of one or more new members, but did not see why this could not be done. The Court commented that the problem could be avoided in the future if a Board member whose principal has an interest in an application before the Board would refrain from sitting as a panel member or meeting with the Board until the Board has disposed of the case.

See *UCFW, Local 1252*, p. 199.

30. While not directly on point, the recent Supreme Court of Canada decision in *R. v. Lippe* also provides guidance on whether a part-time adjudicator can appear as a representative before his or her colleagues. *Lippe* involved a Charter challenge to the Quebec practice of appointing practicing lawyers as part-time municipal judges. It was alleged that such appointments infringed the right to a fair hearing before an independent and impartial tribunal under section 11(d) of the Canadian Charter and section 23 of the Quebec Charter of Human Rights and Freedoms.

31. *Lippe* is a difficult case to read, as much of the analysis is contained in Lamer's minority judgment. Gonthier, J., speaking on behalf of the majority, issued very short reasons in *Lippe* which adopted much of Lamer's analysis. The majority reasons make clear that the concept of a judicial independence, as set out in earlier Supreme Court of Canada cases such a *Consolidated-Bathurst*, should not be interpreted as narrowly as Lamer indicated. The majority also appears to be of the view that many of the points made by Lamer with respect to institutional impartiality (a concept created by Lamer

in *Lippe*) would also be relevant to judicial independence or bias.

32. Lamer, J., stated that the objective status of an institution can be relevant to both the requirement for impartiality and independence. Whether or not any particular judge harbours pre-conceived views or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case, but also to individual and public confidence in the administration of justice. Without that confidence, the system cannot command the respect and acceptance that are essential to its effective operation. The test to be applied is the same one as that in *Committee for Justice and Liberty*: the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining the required information. What would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude?

33. The fact that a judge is part-time does not in and of itself raise a reasonable apprehension of bias, but outside activities may give rise to such an apprehension. Given the number of potential conflicts of interest, the practice of law is per se incompatible with the function of a judge. Possible conflicts include:

a) Part-time judges could be pressured by clients to make a particular decision on an issue.

b) An appearance of conflict of interest could arise if a lawyer of the judge's firm or a lawyer involved in a deal with the judge's firm appeared before the judge.

c) If the judge's firm was pursuing a particular government contract, the judge might feel pressure to find for the government position.

d) A client of the judge could be called to testify before him or her.

34. However, *Lippe* found that sufficient statutory safeguards were in place to dispel the reasonable apprehension of bias which was initially created by appointing practising lawyers as part-time municipal judges. The Court relied on the judges' Oath of Office, the Code of Ethics which could be enforced by a special procedure under the Quebec Courts of Justice Act and the requirements of the Cities and Towns Act. These provisions would avoid many potential conflicts. Any other conflicts could be decided on a case-by-case basis.

35. The statutory safeguards which the Court relied on prohibited a number of activities, including:

- practicing as an advocate before any municipal court, other than those of Laval, Montreal and Quebec;
- hearing a case which involves a lawyer from the same law firm;
- hearing a case which involves evidence from a client;
- directly or indirectly representing or acting against a municipality, a member of the municipal council, certain municipal employees, and police officers in the judge's geographical jurisdiction;
- hearing a case involving an issue which is similar to one in a case in which the judge is acting as a representative;
- hearing a case where the judge has given advice upon the matter in dispute, or previously taken cognizance of it as an arbitrator;
- hearing a case in which the judge had acted as an attorney for any of the parties;
- hearing a case in which the judge has made known his opinions outside of court;
- hearing a case if the judge had any interest in favouring any of the parties;

36. While these decisions indicate that a part-time member cannot appear as a representative before the same board, it should be noted that *Societé Canadienne de Metaux Reynolds Limitée* **v.** *Gauthier et al.* (1989) (unreported, Que. S.C.) reaches the opposite conclusion.

37. The fact situation in *Societé Canadienne de Metaux Reynolds* is similar to the Tribunal's, in that the case involved a tripartite workers' compensation tribunal, albeit not the final level of appeal. However, the Quebec Superior Court relied on wording in the Quebec legislation, which does not appear in the Ontario Act, in concluding that there was no violation of the Quebec Charter's requirement of a hearing before an independent tribunal.

38. The Quebec statute contained sections describing how a worker member was to be selected for a hearing in each region. Lists of names were to be prepared and then reviewed

in order, until a worker member declared himself available. That member was then to hear all of the cases during that session. The Court held that the legislation required a certain appointment process and authorized an overlapping of functions which might otherwise have created conflict of interest problems.

39. The Court in *Metaux Reynolds* may also have been influenced by the administrative problems that would be posed by trying to put together a panel to hear a slate of cases arising in a region, if a strict approach to conflicts was taken. Similar administrative problems do not arise where cases are scheduled individually, as the Appeals Tribunal does.

40. *Metaux Reynolds* gives some support to the view that a part-time member can appear before his or her board; however, *Metaux Reynolds* was decided before the Supreme Court of Canada's decisions in *Newfoundland Telephone*, *Consolidated-Bathurst* and *Lippe*. *Metaux Reynolds* also considers different statutory provisions. Thus, it seems likely that *Metaux Reynolds* would not be applied by an Ontario Court.

41. While the OLRB has allowed part-time side members to appear as representatives before it, I am informed by counsel at the OLRB that this practice has never been challenged in the courts. The OLRB does not have a written conflicts policy dealing with this (or any other conflict of interest).

42. The Ontario Pay Equity Hearings Tribunal, on the other hand, has a detailed, written conflict of interest policy. I am advised by counsel at the PEHT, that a part-time member would not be allowed to appear as a representative. The BC Workers' Compensation Review Board, as well as the Appeals Tribunal, have taken the same position.

    CCAT, *Tribune*, June 3, 1989 WCAT, *Compensation Appeals Forum*, Vol. 3, No. 1

43. The BC Review Board changed its former policy of allowing part-time members to appear as representatives because of concerns about an apprehension of bias. The BC Review Board lost the services of a number of members, but felt that this was necessary to enhance and maintain its credibility as an independent quasi-judicial tribunal.

    CCAT, *Tribune*, June 3, 1989

    And see WCAT, *Compensation Appeals Forum*, Vol. 3, No. 1

APPENDIX B

GOVERNMENT POLICY ON CONFLICT OF INTEREST[1]

The provision of guidance regarding conflict of interest is a normal practice in both the public and the private sector. However, for the government and any organization associated with it, an understanding of conflict-of-interest rules is especially important.

Principles

Three key principles need to be recognized.

1. A member of an agency's managing board should not use information obtained as a result of his or her appointment for personal benefit.
2. A conflict-of-interest situation should be declared at the earliest opportunity.
3. No member should divulge confidential information obtained as a result of his or her appointment or election unless legally required to do so.

Defining Conflict of Interest

Conflict of interest normally relates to a direct pecuniary interest of the appointed or elected member, either personally or through the member's family.

Direct pecuniary interest should be interpreted as an individual interest rather than one that is common to a class of persons. That is to say, it is not considered a conflict of interest if a large segment of the population, including the member, will benefit from a decision to which the member is a party. However, *there is* conflict of interest if the member or his or her immediate family could benefit personally from a decision while a larger group of people could not.

Immediate family should be interpreted to include the spouse, parents or children of the appointed or elected member.

Suggested Practice

Declaration of conflict

Any member of an agency who has a conflict of interest in a matter under consideration by the agency should disclose the nature of that conflict to the head or chairperson at the first opportunity and refrain from any further participation in the discussion.

The chairperson or designate should record in the minutes any declared conflict of interest on the part of the member and notify the minister of the nature of the conflict.

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1 *Establishment and Administration of Agencies: A Manager's Guide*

Quorum

When a declaration of conflict of interest has been made, the chairperson should ensure that a quorum — a majority of members unless the constituting instrument makes any specific provisions — remains to consider and make a recommendation on the matter.

If there is an insufficient number of remaining to make a quorum, the chairperson should refer the matter to the responsible minister.

The minister should deal with the composition of the board so as to enable a decision by the board on the matter in question. This may entail making a temporary appointment or deferring the matter to a subsequent meeting when a sufficient number of members will be present.

Penalties for noncompliance

If a member fails to declare a conflict of interest unless this failure is the result of a bona fide error in judgement — the minister, with the approval of the Lieutenant-Governor, may revoke the appointment and appoint a new member to the agency in question.

If the contravention has resulted in a personal gain, or a financial loss to the agency, the government may disqualify the person from further government appointments and require restitution of the funds in question.

Responsibilities

Conflict of interest is primarily a matter of personal responsibility and integrity.

However, both ministers and agency heads are responsible for ensuring that all the appointed and elected members of every agency are made aware of the need to declare any conflicts of interest and of the penalties that may result from failure to do so.

Ministers are specifically responsible for taking any necessary actions when either there are insufficient remaining members to form a quorum or any penalty for noncompliance needs to be considered.

Agency heads are specifically responsible for recording any conflicts and keeping the minister informed of such matters.

Other Guidelines

In the event that a member is also a public servant, the rules on conflict of interest prescribed in the regulations under the *Public Service Act* will apply.

Agencies incorporated under any Ontario or Canada corporation or business corporation acts will be bound by any provisions on conflict of interest under those acts.

For some agencies, particularly those with a commercial orientation, these guidelines may not be extensive enough to deal with all situations. In these instances, the individual agency managing boards should consider adopting more specific rules on conflict of interest.

APPENDIX C

HALLMARKS OF A GOOD-QUALITY ADJUDICATIVE DECISION

The following is the list of hallmarks of good quality relating to adjudicative decisions as adopted by the Workers' Compensation Appeals Tribunal in its Statement of Missions, Goals and Commitments, October, 1988.

1. The decision does not ignore or overlook relevant issues fairly raised by the facts.
2. The decision makes the evidence base for the panel's decisions clear.
3. On issues of law or on generic medical issues, the decision does not conflict with previous Tribunal decisions unless the conflict is explicitly identified and the reasons for the disagreement with the previous decision or decisions are specified.
4. The decision makes the panel's reasoning clear and understandable.
5. The decision meets reasonable standards of readability.
6. The decision conforms reasonably with Tribunal standard decision formats.
7. From decision to decision the technical and legal terminology is consistent.
8. The decision contributes appropriately to a body of decisions which must be, as far as possible, internally coherent.
9. The decision does not support permanent conflicting positions on clear issues of law or medicine. Such conflicts may occur during periods of development on contentious issues. They cannot be a permanent feature of the Tribunal's body of decisions over the long term.
10. The decision conforms with applicable statutory and common law and appropriately reflects the Tribunal's commitment to the rule of law.
11. The decision forms a useful part of a body of decisions which must be a reasonably accessible and helpful resource for understanding and preparing to deal with the issues in new cases and for invoking effectively the important principle that like cases should receive like treatment.

APPENDIX D

GUIDELINES FOR REVIEW OF DRAFT DECISIONS

1. The Tribunal has recognized from its inception that its decision draft review process must be fully respectful of Hearing Panels' independence and autonomy.

2. The purpose of the Tribunal's decision draft review as described most recently in the 1990 Annual Report (p. 6) is "maintenance of the general quality and consistency of the Tribunal's decisions and ... the continued coherence and usefulness of the Tribunal's developing jurisprudence".

3. In *Consolidated-Bathurst* and in *Tremblay*, the Supreme Court of Canada has confirmed that fostering the quality and reasonable consistency and coherency of decisions is a legitimate and important institutional role for tribunals.[1] The Court specifically approved internal consultation processes designed to influence (but not to constrain) decision-makers on generic, legal and policy issues. It also explicitly recognized that the importance of adjudicative coherence amongst tribunal decisions is a criterion that is relevant for individual tribunal adjudicators.[2]

4. Decision draft review is one of the Tribunal's processes for fostering the quality - including especially the consistency and coherence - of its decisions. The review process is the responsibility of the Office of the Counsel to the Chair (OCC) which Office is comprised of the Counsel to the Chair and her associate counsel. The purpose of the review is to check draft decisions referred for review by panel members against the Tribunal's "Hallmarks of Decision Quality". These "Hallmarks" were adopted by the Tribunal in written form in 1989 in its "Statement of Mission, Goals and Commitments". A copy of the "Hallmarks" is attached to these Guidelines.

5. In accordance with the fundamental principle that the power to decide rests with the Hearing Panel, it is for the Hearing Panel or any of its members to request review of a draft decision. But in considering whether a draft decision ought to be referred for review, panel members will have in

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1 *Consolidated-Bathurst Ltd. v. International Woodworker's of America Local 2-69* (1990), 68 D.L.R. (4th) 524 at pp. 555, 562-563, 567; and *Tremblay v. Quebec (Commission des Affaires Sociales)* (1992), 90 D.L.R. (4th) 609 at pp. 621-623, 624-625

2 *Consolidated-Bathurst*, per Gauthier, at p. 562:
"A decision-maker may also be swayed by the opinion of the majority of his colleagures in the interst of adjudicative coherence since this is a relevant criterion to be taken into consideration even when the decision-maker is not bound by any *stare decisis* rule "

mind their responsibilities as adjudicators to ensure that their decisions comply reasonably with the Tribunal's Hallmarks of Quality, and, in particular:

(1) that their decisions are coherent relative to prior Tribunal decisions;

(2) that with respect to previous decisions dealing with like issues, their decisions are reasonably consistent (unless they are satisfied that such prior decisions can be distinguished on their facts or are wrong).

6. In deciding whether to request OCC review of a draft decision, panel members are requested to consider particularly the criteria set out in paragraph 10 of these Guidelines. However, any panel member may request review of any draft decision at any time. Where a panel member requests review of a draft minority or majority decision, it is helpful for counsel to have an opportunity to review both drafts.

7. As an expert appeal body deciding difficult medical and legal issues, the Tribunal is concerned with providing training to its new members. As part of their training, new Vice-Chair appointees are required to write at least one mock decision and submit it to OCC for draft review. Once assigned to hearings, new Vice-Chairs are asked to consider the following guidelines in deciding whether to request draft review:

(a) New Vice-Chair appointees with no previous workers' compensation experience are encouraged to submit their first 20 entitlement cases; first five right-to-sue, access and medical examination decisions; and first two leave-to-appeal decisions.

(b) New Vice-Chair appointees with previous workers' compensation experience are encouraged to submit their first 10 entitlement decision; first three right-to-sue, access and medical examination decisions; and their first leave-to-appeal decision.

8. Draft review during the orientation period for new Vice-Chairs is intended to assist new Vice-Chairs in the development of their workers' compensation knowledge, writing skills and understanding of the Tribunal's "Hallmarks of Decision Quality".

9. Unless a panel member specifies draft review by a particular member of O.C.C., the review will be done by the first available counsel. Requests for review of a second draft will be referred to the counsel who reviewed the first draft, unless the person requesting review specifies otherwise.

10. Review of a draft decision would seem particularly indicated where the decision:

a) addresses a new development issue or an issue that is for other reasons of particular current, Tribunal-wide interest;

b) may be expected because of its nature to lead to media attention, a judicial review application, an Ombudsman complaint, or a reconsideration request;

c) departs from the approach previously taken in Tribunal decisions;

d) affects Board policy or practice; or

e) involves a dissent on a significant issue.

11. From time to time, the Chair or Counsel to the Chair may identify certain issues that in their view should be seen for purposes of the draft review process as currently of particular Tribunal-wide interest.

12. Drafts referred for review will not be shared by O.C.C. counsel with the Tribunal Chair or with any member of the Tribunal other than the referring member unless instructed by the member to the contrary. Counsel may, however, discuss drafts amongst themselves.

13. On any generic issue of law or policy, any member of a hearing panel is welcome to consult at any time with any other member of the Tribunal, including with the Tribunal Chair.

14. Counsel's comments regarding a draft decision will be forwarded to the panel member who requested draft review. It is the responsibility of that member to bring significant issues to the attention of the other members of the Hearing Panel.

15. After reviewing a draft, OCC counsel may occasionally suggest that it would be helpful to review a second draft of the decision. The decision whether to request review of the second draft rests with the panel member who requested review of the first draft.

16. OCC counsel are available to discuss any legal question with any panel member, or to provide research assistance, before or after a draft is written.

17. Where, as a result of OCC draft review (or, indeed, for any reason), a Hearing Panel decides that it must address an issue or an authority that was not in view at the hearing, the Panel must consider whether natural justice requires that the parties to the case be given an opportunity to make further submissions, or to lead further evidence.

18. OCC will meet regularly with the Tribunal Chair to review newly *released* decisions and to discuss issues and problems of current concern, generally.

19. If, in the course of their work, OCC counsel encounter a draft decision that is pertinent to a generic issue or problem that they expect would be of special interest to the Tribunal Chair, they may advise the referring member of the Chair's likely interest. They shall not, however, mention that advice to the Tribunal Chair nor bring the draft to his or her attention in any other manner.